



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

DECISION

v.

[REDACTED], Respondent

FOF/171223

PRELIMINARY RECITALS

Pursuant to a petition filed January 07, 2016, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on March 25, 2016, at Wausau, Wisconsin.

The hearing was originally scheduled to take place on February 12, 2016. The Respondent did not appear for this hearing. Because the agency did not provide 30-days, advanced notice of the hearing, it was rescheduled to March 25, 2016. The agency subsequently provided 39 days advanced notice of the March 25th hearing.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

NOTE: Judicial notice is being taken of the plea agreement and conviction in case [REDACTED] from the Federal District Court.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Milwaukee Enrollment Services
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

Respondent:

██████████
 ██████████
 ██████████

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # ██████████) is a resident of Marathon County who FoodShare benefits from February 2012 through December 2012. The FoodShare disbursements were made to the Respondent on the 14th of the month between February and December 2012. (Exhibit 7)
2. On October 12, 2011, the Respondent completed an ACCESS application, reporting an address in Green Bay. The Respondent electronically signed the application, indicating "I understand the penalties for giving false information or breaking the rules." This application contained a penalty warning that advised the Petitioner that he could be disqualified from the FoodShare program if he traded or sold his benefits. (Exhibit 12)
3. In April 2012, the Respondent completed an on-line ACCESS six month report form. At that time his, case was "transferred to correct county of residence, Winnebago County". (Exhibit 9)
4. An EBT card ending in ████████ was used to redeem benefits at ██████████ as follows:

6/15/12 for \$200
 7/15/12 for \$200

(Exhibit 15)
5. The card ending in ████████ has a status listing of: "In active – Card could not be delivered". (Exhibit 15)
6. On June 26, 2012, the Respondent contacted the agency to, "request his case be closed as he has moved out of state and is applying for benefits in Minnesota; provided current mailing address for NOD to be rec'd at. Case closing 07/31/12." (Exhibit 9)
7. The Respondent applied for benefits in Minnesota in June 2012. He received food stamp and healthcare benefits in Minnesota through November 2012. (Exhibit 9)
8. On February 15, 2016, the agency sent the Respondent an Administrative Disqualification Hearing Notice, alleging that he trafficked \$400.00 in benefits with ██████████ ██████████ in June and July 2012. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing was originally scheduled to take place on February 12, 2016. The Respondent did not appear for this hearing. Because the agency did not provide 30-days, advanced notice of the hearing, it was rescheduled to March 25, 2016.

The agency sent the Respondent an Administrative Disqualification Hearing notice 39 days in advance of the hearing. [REDACTED] testified that the Respondent has an open case; that the notice was sent to his last known address and that the agency received no returned mail.

The Respondent did not appear at the hearing and the Respondent did not contact the Division of Hearings and Appeals within 10 days to explain his failure to appear. As such, it is found that the Respondent did not have good cause for his non-appearance.

The Merits of OIG's Claim

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or

2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the trafficking occurred.

In the case at hand, Milwaukee Enrollment Services has not established, by clear and convincing evidence, that the Respondent was selling his FoodShare benefits. First, the EBT card in question was listed as inactive, because it could not be delivered to the Respondent. So, the Respondent probably didn’t get the card. Second, in June 2012, at the time the first transaction occurred, the Respondent had moved to Minnesota and applied for benefits there. Indeed, he contacted the agency and asked that his Wisconsin case be closed, for this very reason. Third, the Respondent’s reported addresses were in Green Bay, somewhere in Winnebago County and somewhere in Minnesota. Milwaukee seems like a long way for the Respondent to go from Winnebago County or Minnesota, to cash in on a fraction of his FoodShare benefits.

Clearly, there is more to this story, but without that additional information, there is not enough evidence to prove that the Respondent found his way to Milwaukee, with a card that couldn’t be delivered to him, and sold his benefits to [REDACTED].

Based upon the foregoing, it is found that the agency has not met its burden to prove, by clear and convincing evidence, that the Respondent was trafficking (selling) his FoodShare benefits in June and July 2012.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent was trafficking (selling) his FoodShare benefits in June and July 2012.

THEREFORE, it is ORDERED

That IPV claim number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

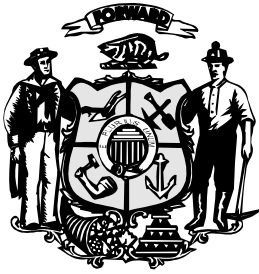
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Milwaukee, Wisconsin, this 5th day of
April, 2016

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 5, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov